

Section Water Quality Certification Program Administrative and Procedural Rule and Wetland WQS Implementation

PURPOSE

The purpose of Article 327 IAC 17 is to establish procedures and criteria for the application, processing, and review of state water quality certifications required by the provisions of the federal water pollution control act, 33 USC ss. 1251 et.seq.

APPLICABILITY

The provisions of this rule shall apply to all persons who are required to obtain any of the following permits or licenses -

- A. A permit from the U.S. Army Corps of Engineers pursuant to Section 10 of the River and Harbors Act.
- B. A permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act.
- C. A permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act and Section 10 of the River and Harbors Act.
- D. Any other federal permit or license to conduct any activity which may result in the discharge or dredged or fill materials to waters of the state.

DEFINITIONS

Mitigation
Water dependent

APPLICATION REQUIREMENTS

Sec. 2. (a) Any person required under Section 401 of the Clean Water Act to obtain water quality certification shall submit to the department a complete and legible application on a form approved by the department. Failure to submit a complete and legible application shall result in the denial without prejudice of water quality certification.

(b) All applications must contain a statement signed by the applicant which shall state: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(c) 1. Additional information that is needed by the department to complement or clarify an otherwise complete and legible application shall be requested after discussion between the department and

the applicant and shall be submitted by the applicant through certified mail within the time period stipulated by the department. Failure to submit the complete amount of requested additional information within the stipulated time period shall result in the denial without prejudice of water quality certification.

2. IDEM may require any other additional information to assess water quality impacts not listed on the approved form. Examples of additional information include but are not limited to -

- a. Mussel surveys
- b. Fisheries surveys, including macroinvertebrate sampling
- c. Groundwater sampling, including monitoring wells
- d. Sediment sampling and bioassays
- e. Stormwater flow and stormwater management models
- f. Threatened and endangered species surveys
- g. Floristic quality indicators assessments
- h. Karst surveys including dye tracing and flow characterization
- i. Correspondence from other agencies regarding the proposed project.

PUBLIC NOTICE OF WATER QUALITY CERTIFICATION APPLICATIONS

Sec. 1. (a) General. The purpose of the public notice is to inform the public of applications being submitted for water quality certification under section 401 of the Clean Water Act and to solicit comments and information regarding the proposed projects. IDEM will provide public notice of an application as soon as possible after receiving the application. The notice shall contain information, provided by the applicant, on the following:

- (1) The applicable statutory and regulatory authority.
- (2) The name and address of the applicant.
- (3) The name, address and phone number of the IDEM employee from whom additional information concerning the application may be obtained.
- (4) The location of the proposed project.
- (5) A brief description of the proposed project, including the following:
 - (A) Its purpose and intended use.
 - (B) A description of the type of structures (if any) to be erected.
 - (C) A description of the type, composition, and quantity of materials to be disposed of or discharged.
 - (D) Any possible impacts to wetlands or other aquatic resources.
- (6) A copy of the plan and elevation drawing showing the general and specific site location may be obtained from the project manager (where reproducible).
- (7) The length of the comment period (which shall be 21 calendar days from the date of mailing of the public notice).
- (8) A statement that any person may request, in writing, that a public hearing be held to consider the application.

(b) Public notices for applications for all water quality certifications will be sent to the following:

- (1) The applicant.
- (2) Landowners adjacent to the proposed project (as provided by the applicant).
- (3) The Indiana department of natural resources, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service. In cases where a project is situated in an interstate water, IDEM will provide notice to the state water quality certification program in the affected state.
- (4) All persons or parties which indicate in writing they wish to be on the water quality certification program's mailing list for receipt of notice.

(b) Any comments submitted during the comment period will be reviewed by the department. The

department may forward comments to the applicant and request a written response to comments be provided. The applicant shall provide a written response if so requested by the department within 14 days of the receipt of a request from the department. The department shall deny certification if the applicant fails to provide a response.

- (c) IDEM will provide a supplemental public notice of a project where -
 - (1) the proposed project was originally denied certification but the applicant has submitted a new or modified proposal; or
 - (2) the proposed project has significantly changed since the first public notice was issued and public comments were received on the project as originally proposed.
- (d) IDEM may provide a supplemental public notice of a project where the project has significantly changed since the first public notice was issued but no public comments were received on the project as originally proposed.
- (e) IDEM will jointly public notice applications for water quality certification with the U.S. Army Corps of Engineers for projects which qualify for a Corps of Engineers Individual Permit. These notices shall be carried out in accordance with the public notice procedures set forth at 33 CFR ss 325.3 as utilized by the Corps of Engineers
- (f) Public Hearings
 - (1) Unless the public notice specifies that a public hearing will be held, any person may request in writing that a public hearing be held to consider issues related to water quality in connection with a specific application for certification. This request must be made within the public comment period. The request shall also state the reason for the public hearing as specifically as possible to assist IDEM in determining whether a public hearing is warranted.
 - (2) IDEM may attempt to resolve any issues raised by a request for a public hearing before granting or denying the request for a hearing.
 - (3) IDEM may hold a public hearing if it receives a request for a public hearing in writing and:
 - A. Substantial questions regarding the project's impacts on water quality are raised.
 - B. New information is presented regarding impacts to water quality.
 - C. Significant public interest is expressed in the project.
 - (4) IDEM may chose to hold a public hearing of its own initiative.
 - (5) If IDEM grants a request for a public hearing, then a public notice of the hearing will be published. The public notice will set forth the time, place, and date of the hearing. The hearing will generally be set near the location of the proposed project.
 - (6) At the public hearing, any person may appear and present oral or written comments concerning the proposed project. The public hearing will be recorded. The applicant will be encouraged to attend the public hearing.
 - (7) IDEM may chose to hold the public hearing with other agencies, including the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Indiana Department of Natural Resources.
 - (8) A copy of the transcript may be purchased from IDEM or the reporter of the hearing. A copy will be available for public inspection during IDEM's normal business hours.
 - (9) All comments made or submitted at the public hearing will be considered by IDEM before a decision is rendered on the application.

REVIEW OF 401 WQC APPLICATIONS

MITIGATION

General

For all projects which involve adverse impacts to Tier I wetlands, compensatory mitigation shall be performed to replace the existing wetland and its uses with a wetland of the same type that supports uses equal to or higher than existing uses of the impacted wetland, unless it is determined to be unnecessary by the commissioner due to there being no significant detrimental impact to the water quality. Compensatory mitigation shall be performed to replace the existing Tier II wetland and its uses with a wetland of the same type that supports uses equal to or higher than existing uses of the impacted wetland; if mitigation is not practicable, impacts to Tier II wetlands shall not be permitted.

- A. Compensatory mitigation shall be required for all unavoidable wetland impacts unless otherwise determined by the Commissioner.
- B. All uses supported by a given wetland as identified by IDEM in the assessment of wetlands and project impacts which will be adversely impacted or impaired must be replaced with the same uses in a mitigation wetland, if mitigation is required.

Documentation required

- a. Mitigation Plan: If mitigation is required the applicant shall submit a mitigation plan before a 401 certification letter is issued. Each mitigation plan shall address the following:
 - 1. Existing conditions
 - 2. Acreage of impact and mitigation
 - 3. Description of mitigation goals
 - 4. Description of mitigation methods
 - 5. Post construction drawings, plans and maps including but not limited to:
 - A. Detailed topographic drawing
 - B. Cross section
 - C. Planting plan
 - D. Development plan
 - E. Aerial photograph
 - F. General location map
- b. Monitoring Plan: The applicant shall submit a mitigation monitoring plan before a 401 certification is issued. Each monitoring plan shall address the following:
 - a. Description of mitigation goals
 - b. Success criteria which must be met
 - c. Methods for evaluating the mitigation
 - d. Map of sample points
 - e. Monitoring schedule
- c. Monitoring Reports: applicants shall submit monitoring reports to IDEM as required by the specific conditions of the 401 certification. IDEM shall formulate specific guidance for what a complete and acceptable monitoring report shall contain. At a minimum each monitoring report shall address the following:
 - a. Project description
 - b. Monitoring Methods
 - c. Results of monitoring
 - d. Discussion of the mitigation area's progress
 - e. Photographic documentation
 - f.

Success Criteria

- b. IDEM shall specify a set of success criteria for each mitigation site in the 401 certification letter.

- c. Success criteria shall address the following -
 - 1. Mitigation must achieve characteristics and criteria of a jurisdictional wetland as defined in procedures established by the Corps of Engineers stated at 33 CFR XXX.
 - 2. The mitigation site must be 95% free of the following exotic or nuisance species -
 - a. Phragmites
 - b. Purple Loosestrife
 - c. Eurasian milfoil
 - 3. At least 70% of all planted species must have survived.
 - 4. Must replace use or uses originally supported by wetland degraded by certified activity.
- D. All mitigation shall be monitored for at least 5 years and continue monitoring until the success criteria are met.
- E. Remediation: If the success criteria has not been met within 5 years of the completion of the mitigation site within 60 days the applicant shall submit to IDEM a plan identifying the problems which are hindering the site's development and how these problems will be fixed. Monitoring shall continue until the success criteria are met. Remediation shall continue until the mitigation meets the success criteria.

Location of mitigation

- A. Tier I Wetlands
 - A. If feasible and practicable, mitigation of wetland impacts should occur on the same site as the location of the project and its associated impacts.
 - B. If in the judgement of IDEM the success of onsite mitigation is unlikely, impacts less than or equal to 0.25 acres of wetlands must be mitigated within the same six-digit watershed (USGS HUC) as the project impact. Mitigation must, to the greatest extent possible, be in close proximity to the impact site.
 - C. If in the judgement of IDEM the success of onsite mitigation is unlikely, impacts greater than 0.25 acres of wetlands must be mitigated within the same eight-digit watershed (USGS HUC) as the project impact. Mitigation must, to the greatest extent possible, be in close proximity to the impact site.
 - D. If in the judgement of IDEM the success of onsite mitigation is unlikely and impacts are located within, adjacent to, or within the same 14 digit watershed (USGS HUC) of a waterbody listed on Indiana's 303(d) list of impaired waters, then impacts must be mitigated within the same 14-digit (USGS HUC) as the project impact. Mitigation must, to the greatest extent possible, be in close proximity to the impact site.
- b. Tier II Wetlands

All impacts regardless of size must be mitigated within the same 14-digit (USGS HUC) as the project impact. Mitigation must, to the greatest extent possible, be in close proximity to the impact site.
- 3. Minimum mitigation for highly impaired wetlands
 - 1. Wetlands which have been significantly degraded or whose uses have been impaired must be mitigated in accordance with the following criteria.
- 5. Assessment of mitigation proposals

All mitigation proposals shall be evaluated by IDEM and ranked according to the following success criteria.

 - 1. High
 - 2. Medium
 - 3. Low

6. Types of mitigation
 1. IDEM recognizes the following types of mitigation for wetland impacts -
 - I. Restoration
 - II. Creation
 - III. Rehabilitation
 - IV. Preservation
 2. Restrictions
 - I. No mitigation proposal will be accepted by IDEM which is comprised solely of rehabilitation, preservation, or a combination of the two, except as follows -
 - A. For degraded wetlands as identified in Section ** of this rule, preservation of Type II wetlands may be accepted if there are no adverse impacts associated the loss of the degraded wetlands and if a net gain to water quality can be obtained. IDEM may require up to 1:1 replacement of wetlands in addition to preservation at the discretion of the Commissioner.
 2. Rehabilitation and/or preservation may be used in conjunction with restoration and/or creation to adjust downward mitigation ratios as specified in section ** of this rule
2. Calculation of ratios
 - a. The following formulas will be used to calculate mitigation ratios for adverse impacts to wetlands for Tier I wetlands.
 1. Determination of wetland class
 - A. Emergent/shallow marsh (PEM)
 - B. Scrub/shrub (PSS)
 - C. Forested (PFO)
 2. Associated ratio ranges
 - A. PEM - 1:1 to 3:1
 - B. PSS - 2:1 to 4:1
 - C. PFO - 3:1 to 5:1
 3. Final ratio determination
 - A. IDEM will determine a final ratio based on the assessment of the mitigation plan success criteria and the wetland class. The following matrix summaries the possible outcomes -

High	1.5:1	2:1	3:1
Medium	2:1	3:1	4:1
Low	3:1	4:1	5:1
	PEM	PSS	PFO

- B. Mitigation proposals which involve rehabilitation and/or preservation.
 1. IDEM will evaluate these proposals and may adjust a final mitigation ratios to reflect the net benefit for water quality of the proposal.
 2. The ratio may be adjusted downward at the discretion of the Commissioner by a factor no greater than 3, and in no case shall mitigation be less than 1:1 unless as defined in Section ** of this rule.

Surety/Guarantee of Success

- A. Mitigation shall be guaranteed by one of the following before impacts are made:
 - A. Mitigation shall be completed up-front and proven successful before impacts are made.
 - B. Mitigation shall be guaranteed by a performance bond for the cost of construction.
 - C. Mitigation shall be guaranteed by irrevocable letter of credit for the cost of construction.
- B. The bond or letter of credit shall not be released until the success criteria are met.

Mitigation Banking

IDEM may allow the utilization of a mitigation bank if:

- A. The mitigation bank has been approved by IDEM.
- B. The mitigation produced at the bank replaces uses for the wetlands lost at the impact site.

Mitigation for Stream and River Projects

General - For projects involving the channelization, piping, relocation, armoring, or any other activity which alters more than 100 feet of a river, stream, or other flowing water, the following mitigation requirements shall apply.

A. Site assessment

The applicant shall perform the following in order to adequately characterize impacts -

1. An assessment of all reaches of all impacted streams in the project area utilizing the Qualitative Habitat Evaluation Index methodology.
2. An assessment of the in-stream habitat requirements of fish species noted in the stream assessment. This assessment should break down, by species, all aspects of stream structure which impact and support foraging, breeding, nursery, and refuge areas for the noted species.
3. A mitigation plan which specifically details the replacement of habitat types detailed in Point number two of this letter. Detailed specifications for pools, riffles, and any in-channel or streambank habitat structure must be provided, including depictions of the locations of these structures on the project plans. An explanation of the construction plans, the predicted success, and detailed contingency plans should these methods fail must also be provided.
4. A specific construction time-line noting the sequence of construction of the project and the construction of mitigation.

B. Success criteria

General - The project will be considered successful upon the demonstration of the following after the requisite monitoring period is completed. The applicant will not be released from the obligation to correct any and all outstanding problems until the success criteria are met.

1. The reconstructed channels support a community of fish species equal to or greater in quality (based on the Indices of Biotic Integrity).
2. The riparian corridor of the relocated streams meet or exceed the original QHEI scores and the streambanks and bottom are stable. A site inspection with the applicant will be required to assess overall bank stability and the need for additional structural improvements or corrections.

3. The reconstructed channels match the grade, hydraulic capacity, and basic channel geometry of the channels to be impacted.

C. Monitoring, Testing and Sampling Requirements

1. The applicant or an authorized agent shall perform the following tests and sampling methods to monitor the development and overall success of the relocated channels. Failures observed as a result of these requirements will be addressed according to the contingency requirements as stated below.
2. All reports listed below must be submitted to IDEM annually for five years following the completion of the new channels. At the end of five years IDEM will evaluate the project based on the success criteria and determine if additional action or monitoring is warranted. The applicant will be required to submit a baseline report summarizing the construction process and the design features implemented to restore aquatic habitat.
3. The applicant will perform the following sampling protocol, beginning at the time the relocated channels are completed and water is released into these channels.
 - A. A final survey of the grade, shape, and capacity of the new channels to verify that these criteria match the current channels to be impacted.
 - B. In July of the year after the release of water into the relocated channels, fisheries sampling from points to be established in continued discussions will commence for a period no less than 5 years, with sampling conducted on an annual basis. Fisheries assessments and sampling shall be carried out following IDEM's IBI protocols and index calculations. All reports will be submitted to IDEM within 30 days of the completion of sampling activities.
 - C. QHEI assessments, conducted at the same points used for IBI sampling, shall commence on the same schedule and duration as stated in Part B preceding this section. All reports will be submitted to IDEM within 30 days of the completion of sampling activities.
 - D. Annually, the applicant or an authorized agent shall inspect any and all habitat structures and features placed within the channel and note their condition and any potential or real structural failures within the channels. Other maintenance issues such as the excessive accumulation of sediment or debris should be noted.
 - E. Annual reports to IDEM shall include all summary and raw data sheets, as well as a narrative overview of the results of the surveys and a relative comparison to the success criteria. If a downward trend is noted, the applicant must provide rationale and modifications to the contingency plan which will be implemented as per any stipulated time frames or permit conditions.

D. Contingency Requirements

The applicant shall develop a contingency plan which outlines how the applicant will respond to structural failures, damage from storm events, downward trends in fishery communities, and die-off among plants or other vegetation features. This plan must be completed and approved prior to the commencement of work on the project and may be modified or updated to reflect changes in the project or failures not anticipated by IDEM.

FINAL AGENCY DECISION FOR 401 CERTIFICATIONS

4. General - IDEM may render any of the following decisions after an assessment review is complete

- on a given project application -
- a. Deny water quality certification
 - b. Approve water quality certification without conditions
 - c. Approve water quality certification with conditions
 - d. Waive water quality certification
2. Denial of water quality certification
- The agency shall deny water quality certification if any of the following criteria are met -
- a. The applicant has failed to submit an administratively complete application as specified in section ** of this rule.
 - b. The activity will cause or contribute to a degradation of water quality within wetlands and/or other waters of the state as defined in section ** of this rule.
 - c. The activity will cause or contribute to a degradation of water quality which may be mitigated as determined by IDEM but the applicant has failed to submit a plan to address mitigatable impacts.
 - d. An applicant that chooses to reapply for the same activity shall be eligible to reapply no sooner than forty five (45) days after the denial date issued by the department.
5. Waiver of water quality certification
- a. If the agency fails to act upon a request for water quality certification within year from the receipt of a administratively complete application, the application will be deemed waived and thereby approved without conditions by default.
- b. Approval of water quality certification
- a. Upon the determination that a proposed activity is or will be in compliance with water quality standards, IDEM shall issue an approved water quality certification.
 - b. This certification may contain any terms or conditions deemed necessary to insure compliance with state water quality standards and/or to replace or restore degraded uses of wetlands or other waters.
 - c. Conditions stated in the certification must be observed and implemented fully by the applicant.
 - d. IDEM shall not approve any certification if the applicant has failed to provide materials needed to determine compliance with water quality standards, or any other provision of this rule.
- e. Modification/revocation of 401 certifications
- d. IDEM shall revoke any Section 401 Water Quality Certification if it is determined that:
 1. The applicant has failed to comply with conditions of the water quality certification.
 2. The applicant has caused or is likely to cause violations of the state's water quality standards.
 3. The applicant has failed to construct mitigation measures as prescribed in a certification, or has failed to construct the project according to plans or specifications reviewed by IDEM.
 4. Information supplied by the applicant is false or deliberately misleading.
 5. The applicant has failed to provide IDEM with monitoring reports or other such post-construction reports or documents.
 - b. A water quality certification may be revoked at anytime if the commissioner determines that any applicable laws or regulations have been or are likely to be violated.
 - c. IDEM may modify any approved water quality certification if -

1. An applicant submits a new application and describes changes or revisions which decrease impacts to water quality or otherwise reduce the scope of a project.
 2. An applicant submits a new application and describes changes or revisions which do not affect water quality.
 3. An applicant submits a new application and describes changes or revisions which will adversely impact water quality.
- D. For c. (1-3) IDEM must public notice and review the proposed revisions as per Sections ** and ** of this rule. All modifications to the original application must be reviewed in accordance with this section before a modified water quality certification may be processed.
- E. IDEM may chose to approve or deny any or all proposed modifications in accordance with Section ** of this rule.

APPEALS PROCESS

All final decisions regarding water quality certification may be appealed in accordance with IC 4-21.5, the Administrative Orders and Procedures Act.

ENFORCEMENT AND COMPLIANCE

1. The provisions of this rule are subject to IDEM's enforcement authority stated at XXX.
2. Failure to abide by the terms and conditions of any final decision rendered under this rule is an enforceable action under XXX.
3. All conditions and specifications are jointly and severably enforceable under this provision.
4. Certification holders are bound by all conditions on an issued certification, even if a specific condition is modified or revoked.
5. Upon the discovery of any violation of this rule IDEM may take the following actions -
 - a. Issue a Cease and Desist order instructing the responsible party to stop all work and provide a written response to IDEM stating the reason or reasons for an unauthorized activity.
 - b. Other orders or directives as specified in Section XXX of Rule AAA.